Leow Nyok Chin v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45–24 OF 1998
CLEMENT SKINNER JC
11 DECEMBER 1998

Criminal Procedure *— Bail — Non-bailable offence — Murder — Prohibition on bail where offence punishable with death or life imprisonment — Medical reasons tendered in support of bail — Whether accused's medical condition warranted granting of bail — Whether public interest outweighed that of accused — Criminal Procedure Code (FMS Cap 6) s 388(1)*

The accused was charged under s 302 of the Penal Code (FMS Cap 45) for the murder of her husband. Upon the charge being read out to her, the accused claimed trial. Counsel for the accused then made an oral application for bail pursuant to s 388(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The accused was 58 years old and had a previous good record and good standing in society. There was also no suggestion that the accused would tamper with evidence or intimidate the prosecution witnesses. Counsel for the accused relied on the provisions of s 388(1) of the CPC as well as the proviso therein in support of the application for bail. He argued that by virtue of the cautioned statement and medical report issued, there existed no grounds to believe that the accused was guilty of any offence so charged and hence ought to be entitled to bail. In relation to the proviso to s 388(1) of the CPC, counsel for the accused argued that: (i) psychiatric and/or medical observation required by the accused would be easier to obtain if she was on bail; (ii) medical attention for the accused's mental disease is required before her condition became permanent; (iii) constant care and emotional support which could be provided by her family was required by the accused, failing which the accused might be driven to insanity and thus become unfit to enter a plea; and (iv) the accused required a place which provided mental, physical and emotional stability in order to prepare her defence.

Held, dismissing the application and directing that the accused be remanded until trial:

(1) The prohibition imposed on the court to the granting of bail by the words 'but he shall not be so released if there appears reasonable grounds for believing he has been guilty of an offence punishable with death or imprisonment for life' under s 388(1) of the CPC would not apply where the person accused of such an offence comes within the proviso to the section. The proviso confers upon the court a discretion in the instances therein to consider granting bail nothwithstanding that a person is charged with an offence punishable with death or life imprisonment. As such, the accused's application for bail fell for consideration under the proviso to s 388(1) of the CPC (see p 443C–E).

(2) There was nothing in the medical report to suggest that the accused was in danger of being driven to permanent insanity unless she received emotional support from her family nor that the accused could not receive treatment whilst in custody. With regard to the question of ease of obtaining psychiatric and/or medical observation with bail granted, the court could not consider convenience a matter to be taken into account. Bearing in mind the contents of the medical report and the nature of the illness afflicting the accused, the larger public interest outweighed that of the accused and militated against the grant of bail (see pp 444I and 445A–C).

(3) The gravity of the offence and the seriousness of which is reflected in the punishment must also be taken into account and the court's discretion in such circumstances must be exercised sparingly and judiciously. Bail should only be granted where there are exceptional and special reasons. In this case, the medical condition of the accused and other grounds advanced did not afford the accused any exceptional or special reasons for bail (see p 445E–G).

[Bahasa Malaysia summary

Tertuduh dipertuduhkan di bawah s 302 Kanun Keseksaan (NMB Bab 45) untuk pembunuhan suaminya. Selepas tuduhan dibacakan kepadanya, tertuduh meminta dibicarakan. Peguam tertuduh kemudiannya membuat permohonan lisan untuk jaminan menurut s 388(1) Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Tertuduh berumur 58 tahun dan mempunyai rekod terdahulu yang elok dan kedudukan yang baik dalam masyarakat. Tiada apa-apa cadangan bahawa tertuduh akan mengusik keterangan atau mengugut saksi-saksi pihak pendakwa. Peguam tertuduh bergantung kepada peruntukan s 388(1) KAJ dan juga proviso dalamnya bagi menyokong permohonan untuk jaminan. Beliau menghujahkan bahawa disebabkan pernyataan beramaran dan laporan perubatan yang dikeluarkan, tidak terdapat alasan untuk mempercayai bahawa tertuduh bersalah atas apa-apa kesalahan seperti yang dipertuduhkan dan justeru itu berhak diberikan jaminan. Berkaitan dengan proviso kepada s 388(1) KAJ, peguam tertuduh menghujahkan bahawa: (i) pemerhatian psikiatrik dan/atau perubatan yang diperlukan oleh tertuduh akan lebih mudah didapati sekiranya ia diberi jaminan; (ii) perhatian perubatan untuk penyakit mental tertuduh diperlukan sebelum keadaannya menjadi kekal; (iii) jagaan tetap dan sokongan emosi yang boleh diberikan oleh ahli keluarganya diperlukan oleh tertuduh, yang mana kegagalan untuk mendapatnya tertuduh mungkin akan hilang akal dan justeru itu menjadi tidak layak untuk memasukkan rayuan; dan (iv) tertuduh menghendaki tempat yang menyediakan kestabilan mental, fizikal dan emosi bagi menyediakan pembelaannya.

Diputuskan, menolak permohonan dan mengarahkan bahawa tertuduh ditahan sehingga perbicaraan:

(1) Larangan yang dikenakan ke atas mahkamah mengenai pemberian jaminan oleh kata-kata 'tetapi tidak boleh dilepaskan sedemikian jika ada alasan yang cukup untuk mempercayai dia bersalah terhadap kesalahan yang boleh dihukum dengan hukuman mati atau penjara seumur hidup' di bawah s 388(1) KAJ tidak terpakai di mana orang yang dipertuduhkan dengan kesalahan demikian diliputi oleh proviso seksyen tersebut. Proviso tersebut mengurniakan budi bicara ke atas mahkamah dalam keadaan dalamnya untuk menimbang pemberian jaminan tanpa mengira bahawa seseorang dipertuduhkan dengan satu kesalahan yang boleh dihukum dengan hukuman mati atau penjara seumur hidup. Oleh yang demikian, permohonan tertuduh untuk jaminan harus dipertimbangkan di bawah proviso s 388(1) KAJ (lihat ms 443C–E).

(2) Tiada apa-apa dalam laporan perubatan untuk mencadangkan bahawa tertuduh mungkin akan hilang akal selama-lamanya melainkan ia menerima sokongan emosi daripada ahli keluarganya atau pun bahawa tertuduh tidak boleh menerima perubatan sementara dalam tahanan. Berkenaan dengan persoalan kemudahan mendapati pemerhatian psikiatrik dan/atau perubatan dengan jaminan diberi, mahkamah tidak boleh menimbang kemudahan sebagai satu perkara untuk diambil kira. Dengan mengingati kandungan laporan perubatan dan sifat penyakit yang dihidapi oleh tertuduh, kepentingan awam yang lebih besar mengatasi kepentingan tertuduh dan menghalang pemberian jaminan (lihat ms 444I dan 445A–C).

(3) Keseriusan kesalahan dan yang mana tahap keseriusan dibayangkan dalam hukuman mestilah diambil kira dan budi bicara mahkamah dalam keadaan sedemikian mestilah dilaksanakan secara berhati-hati dan adil. Jaminan seharusnya hanya diberikan di mana terdapat sebab-sebab yang luar biasa dan khusus. Dalam kes ini, keadaan kesihatan tertuduh dan alasan-alasan lain yang dikemukakan tidak memberikan tertuduh apa-apa sebab yang luar biasa atau istimewa untuk jaminan (lihat ms 445E–G).]

Notes

For cases on bail for non-bailable offences, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–579.

Cases referred to

Che Su bte Daud v PP [1978] 2 MLJ 162 (refd)
PP v Latchemy [1967] 2 MLJ 79 (refd)

Legislation referred to A

Criminal Procedure Code (FMS Cap 6) ss 177A, 388, 388(1), First Schedule
Federal Constitution art 5
Penal Code (FMS Cap 45) s 302

Hira Singh (*Asbir Hira Singh & Co*) for the accused. B
Murtazadi bin Amran (Deputy Public Proecutor) for the prosecution.

Cur Adv Vult

Clement Skinner JC:

On 3 December 1998, Leow Nyok Chin ('the accused') was brought before C me, charged with the offence of murder under s 302 of the Penal Code (FMS Cap 45) ('the PC'). Earlier on the same day, the Batu Gajah Magistrate's Court had made an order, pursuant to s 177A of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), transmitting her case for trial by the High Court.

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On her appearing, the charge under s 302 of the PC was read over and explained to the accused. The charge reads as follows:

> Bahawa kamu Leow Nyok Chin (P) KP No 400929–08–5182 pada 22 Julai 1998 di antara jam lebih kurang 10 malam hingga 10.30 malam di dalam rumah No 9 Jalan Lebuh Sayang 2, Taman Sayang, Batu Gajah, di dalam Daerah Kinta, di negeri Perak Darul Ridzuan, telah melakukan pembunuhan E ke atas Chan Kiew @ Chin Kiew (L) KP No 420403–08–5135, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

On the accused confirming she understood the charge, her plea was taken. She claimed trial to the charge. I then fixed her trial to commence on F 26 April 1999 till 30 April 1999.

Mr Hira Singh ('learned counsel') who represents the accused then made an oral application for bail on her behalf. I summarize below the arguments put forward by learned counsel.

First, the facts and personal circumstances relevant to her application G for bail. The accused is 58 years old. She is accused of murdering her husband and voluntarily surrendering herself to the police on 23 July 1998. She is an ex civil servant, having served from 1 January 1963 until her retirement on 1 March 1994 as a school teacher. She married the deceased in 1966 and from the marriage there are four children. Her personal and married life has not been without its trials and tribulations. It is submitted H on her behalf that she has had to suffer the ways of a philandering husband and bear the pain, anxiety and humiliation that brings. She has contributed financially to her husband's business and the childrens' education as a result of which his business expanded and the children received good education, including going overseas for the same. In a nutshell, the accused enjoys good standing in society and is a person of good character. I

Next, the law. Learned counsel submits that the liberty assured to every individual by art 5 of the Federal Constitution should be given effect to by the grant of bail to the accused pursuant to s 388(1) of the CPC. This section provides that bail is only to be refused in cases punishable with death or life imprisonment if there appears reasonable grounds for believing that the accused is guilty of such offence. However, in this case, the prosecution has not been able to produce any evidence or place any facts before the court to show that there are reasonable grounds for believing the accused is guilty of the offence. In reply to the submission of the learned deputy public prosecutor ('the DPP') that the charge and the consent of the Public Prosecutor are sufficient for that purpose, learned counsel submits that when the charge is looked at, it does not contain any particulars from which it can be said there appears reasonable grounds for believing the accused is guilty of the offence. According to learned counsel, the consent of the Public Prosecutor to the institution of these proceedings also suffers from the same infirmity.

In contrast to the inability of the prosecution to show reasonable grounds, learned counsel submits that even at this stage of the proceedings, there are reasons to believe that the accused may never be convicted of the offence charged. Such reasons are afforded first, by the cautioned statement made by the accused to the effect that she had no inclination of what happened on the night of the incident, and second, by a medical report on the state of mind of the accused, issued by Hospital Bahagia on 30 October 1998 which negates any grounds, if they exist, for believing the accused is guilty of the offence charged. The accused is therefore clearly eligible to bail under the main provisions of s 388(1) of the CPC without even having to rely upon the proviso thereto which specifically states that the court may grant bail to any person who is under 16 years or a woman, or is ill or infirm. Learned counsel has also set out suggested conditions upon which bail should be granted.

Lastly, learned counsel relies upon the following nine grounds on which bail should be granted:

(a) accused is a woman and so eligible for bail under the proviso to s 388(1) of the CPC;

(b) accused has been a law abiding person with no previous record or trouble with the law;

(c) accused is unlikely to jump bail because of her strong family ties in Malaysia;

(d) due to her medical condition she needs psychiatric and/or medical attention, failing which she could become permanently ill;

(e) she is unlikely to reoffend and is no threat to society;

(f) she is incapable of intimidating any prosecution witness or interfering with prosecution evidence;

(g) she requires the constant care and emotional support of her family to help her recovery, failing which she will become permanently insane;

(h) the character and standing of the accused should be considered; and

(i) she needs to consult her solicitors to prepare her defence and to remain emotionally stable and needs to be in a place which provides mental physical and emotional stability.

Bail is opposed by the learned DPP on two main grounds:

(a) murder is an offence punishable with death and under s 388(1) of the CPC, the court shall not grant bail in non-bailable offences punishable by death where it appears there are reasonable grounds for believing the accused is guilty of such offence. This is such a case.

In support of the above, the learned DPP points out that at this stage of the proceedings, there is no requirement for the prosecution to produce evidence to prove the guilt of the accused beyond reasonable doubt. All the prosecution needs to show is that there *appears* reasonable grounds to believe the accused is guilty of murder. Such requirement is sufficiently established by the facts revealed in the charge preferred against the accused and from the consent of the Public Prosecutor to the institution of these proceedings. It can be gathered from these documents that prima facie, there appears reasonable grounds for believing the accused is guilty of murder; and

(b) even if the proviso to s 388(1) of the CPC applies, no special and exceptional grounds have been shown why the accused should be granted bail. It is the learned DPP's submission that the matters stated in the medical report do not afford special and exceptional grounds. It is not any sickness that would entitle an accused person to bail. The sickness must involve a risk to life. In support, the learned DPP refers to Sohoni's *The Code of Criminal Procedure*, 1973 (2nd Ed) at p 4554. The learned DPP points out that it is stated in the medical report that the accused is now receiving treatment and that she is fit to plead.

Before considering the merits of the application, I must first consider the provision of law under which bail has been applied for. Murder, an offence under s 302 of the PC is shown in the First Schedule of the CPC as a non-bailable offence. The law on the grant of bail in non-bailable offences is set out in s 388 of the CPC. Learned counsel has in his written submission and in court stated that the application for bail is made under sub-s (1) of s 388 of the CPC. I shall therefore confine my consideration to sub-s (1) which reads:

> (i) When any person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.
>
> Provided that the Court may direct any person under the age of sixteen or any woman or any sick or infirm person accused of such an offence be released on bail.

Now, learned counsel and the learned DPP engaged in a tussel over whether the prosecution had placed sufficient evidence before the court to demonstrate that there appears reasonable grounds for believing the accused to be guilty of the offence charged, it being argued that if there was such evidence, then the court must refuse bail (according to the learned DPP), otherwise, the accused should be released on bail (according to learned counsel).

I find, however, that in considering whether or not to grant bail in this particular case, I need not decide on the competing contentions of the parties on this point because it is my reading of the above subsection that the prohibition imposed on the court to the granting of bail by the words 'but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life' would not apply where the person accused of such an offence is a person below 16 years of age, a woman or is sick or infirm. The proviso to s 388(1) of the CPC confers upon the court in clear and unambiguous terms a discretion, in the instances mentioned, to consider the grant of bail notwithstanding that the person is charged with an offence punishable with death or life imprisonment. There is nothing in the section to suggest that the words of the proviso are not to be given effect to in their plain ordinary meaning.

Following on from what I have stated above, I find that the accused's application for bail falls for consideration under the proviso to s 388(1) of the CPC. Therefore, whether or not the accused is to be granted bail will depend on whether this is a proper case for the court to exercise its discretion in favour of the accused. That discretion is a judicial one to be exercised according to correct principles and considerations.

The learned DPP citing Sohoni at p 4549 has pointed out the various matters which a court may take into consideration when granting or refusing bail. They are:

(i) whether there is or is not reasonable ground for believing the accused is guilty of the offence;

(ii) the nature and gravity of the offence;

(iii) severity and degree of the punishment prescribed;

(iv) the chances of the accused absconding, if released on bail;

(v) the character, means and standing of the accused;

(vi) the danger of the offence being repeated or continued;

(vii) the danger of witnesses being tampered with;

(viii) opportunity of the accused to prepare for her defence;

(ix) the long period of detention and probability of a delay for a further period;

(x) the larger interest of the public.

I now consider the merits of the application. In doing so, I must take into account and giving due weight to all relevant facts and circumstances of this

case, for as stated in the case of *Che Su bte Daud v PP* [1978] 2 MLJ 162, it is the net result of all the considerations for and against the accused which will ultimately decide the matter.

First, the matters which are not in controversy. The accused is 58 years old, has a previous good record and is of good standing in society. There is no suggestion that if granted bail the accused will tamper with evidence or intimidate prosecution witnesses. Accordingly, these matters which form grounds (a), (b), (f) and (h) of her application weigh in her favour.

Next, the state of health of the accused. Learned counsel has tendered in court a medical report from Hospital Bahagia dated 30 October 1998 and put forward three grounds based on medical reasons in support of bail, namely: (i) due to her medical condition (she is still on medication), the accused needs to obtain psychiatric and/or medical observation which will be made easier if she is on bail; (ii) accused needs help of the kind that will cure her mental disease and arrest it before it progresses further into someting permanent; and (iii) the accused requires constant care and emotional support to speed up her recovery, and this can be provided by her family, failing which, the accused would be driven to insanity and unfit to plead. To prepare for her defence, the accused needs to be in a place which provides mental, physical and emotional stability. These constitute grounds (d), (g) and (i) of her application.

In view of the submission of learned counsel, I have paid careful attention to the medical report. Set out below is the essence of each of the six paragraphs of the report:

(a) para 2 states that all laboratory tests done showed normal;

(b) para 3 states that the accused suffers from 'major depression with psychotic features', an illness with the following symptoms: sadness, interruption in sleep, loss of apettite, low self esteem, suicidal tendencies. Apart from the above, there are also psychotic symptoms like hallucinations and delusions. The accused has received treatment from private doctors since 1985;

(c) para 4 states that at the tlme of the incident the accused was aware of her actions but was not aware that the actions were wrong in law because of impairment of judgment;

(d) para 5 states that the accused is now under treatment and she is fit to plead; and

(e) para 6 recommends that the accused continues treatment and medication carefully and deligently and be placed in an environment conducive to her mental and emotional well being.

From what is stated above, I cannot find in the medical report material to suggest, as learned counsel has, that the accused is in danger of being driven to permanent insanity unless she receives the emotional support and care that the family will provide. I therefore find no merit in this submission. There is also nothing in the report to suggest that the treatment which the accused needs cannot be obtained while in detention or that she will be

A deprived of such treatment or attention while in custody. The report states that the accused is now under treatment. As such, I cannot accept the submission that the accused needs help of the kind that will cure her mental disease and arrest it before it progresses into something permanent. With regard to the submission that the psychiatric and/or medical observation which the accused needs will be made easier if she is on bail, I cannot regard B convenience as a matter the court will give any weight to in an application for bail. I do take into account the recommendation in the report that the accused be placed in an environment to provide her mental, physical and emotional stability but in considering whether to give effect to such recommendation, I must bear in mind the nature of the illness afflicting the C accused. The report states that accused suffers from major depression with psychotic features, symptoms of which include hallucinations, delusions and suicidal tendencies. On a weighing of these factors, the larger public interest outweighs that of the accused and militates against the grant of bail. For the same reason, I entertain doubts on the submission that the accused is unlikely to reoffend and is in no way a threat to society (ground(e)). D Similarly, whilst it is submitted that it is unlikely that the accused will jump bail (ground (c)), the report points to the suicidal tendency brought about by her illness which I feel I cannot ignore since it is of immediate relevance when considering whether the accused will appear for her trial if allowed bail. The revelation of such a tendency, when taken into account leans against the grant of bail.

E In addition to the above considerations, I also take into account the gravity of the offence with which the accused is charged — that of murder, the seriousness of which is reflected in the punishment for such offence — death. As pointed out in the case of *PP v Latchemy* [1967] 2 MLJ 79, in cases where the offence is punishable with death, the court's discretion F should be exercised sparingly and judiciously and bail should only be granted where the reasons put forward for its grant are said to be exceptional and very special reasons. For the reasons already given, I have not found the medical condition of the accused as affording her any exceptional or special reasons for bail. Neither do any of the other grounds relied upon by the accused.

G In all the circumstances and giving due weight to the factors telling in favour of and against the accused, I have reached the conclusion that this is not a proper case for the exercising of judicial discretion in favour of the accused by the grant of bail. I accordingly refuse the application. The accused is to be remanded in custody until her trial at Kajang Prison.

H *Application dismissed.*

Reported by Lew Chee Seong

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